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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1365 [redacted]

DOUGLAS NEALL PINE,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW, JURISDICTION, QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS AND STATEMENT OF THE CASE

Respondent accepts petitioner's presentation of the above referenced matters in his petition.

STATEMENT OF FACTS

Petitioner sets forth what he denominates a "statement of facts".

There is nothing in the record to indicate the existence of "an informer, with no reputation of reliability". There was no ruling by the trial court that the search warrant in question was defective. Had there been such a ruling, the ruling would have been attacked on cross appeal in the Arizona court.

At page 5 of his brief, petitioner claims that "While the officer was standing in the doorway, he had no way of telling if there was anything in the house that had been burglarized from the two pet shops (Vol. 1, R. 51)". The State of Arizona refers the Court to Vol. 1, page

51 of the transcript, where nothing whatever concerning Neptune Gardens (one of the pet shops) is mentioned.

The witness stated that no loot from the Red Barn (the other pet shop) was seen. The testimony at Vol. 1, page 8 was as follows:

> "Question: And the door had been opened for you?
>
> Answer: Yes.
>
> Question: And you saw those items in Mr. Pine's apartment?
>
> Answer: The fish tanks, yes."

And at Vol. II, pages 17-18:

> "Q Did you look through the screen door when you approached Mr. Pine's house? When you went up and knocked, did you look into the house, through the screen door?
>
> A No, I didn't look in until after the door was opened.

Q Who opened the door?

A The female that answered the door.

Q Did you ask her to open the door?

A I believe I did so that I could show her my identification.

Q And you did do that? You did show her your identification?

A Yes, sir.

Q While you were showing her your identification, did you see anything inside the apartment?

A Yes, sir.

Q Anything significant to you?

A Yes.

Q What did you see?

A What I believed to be a hundred gallon aquarium.

Q Referring you again to State's

Exhibit Number 8 for identification, is that what you saw when you refer to the hundred gallon aquarium?

A Yes, sir."

The record discloses at Vol. 1, pages 33-34, that the presentation of the search warrant and the conversation which ensued occurred outside the house in the car after the detective had already seen enough evidence to prove petitioner guilty beyond a reasonable doubt. Further reference will be made to relevant parts of the record in connection with the arguments.

ARGUMENT

RESPONDENT'S ARGUMENT ON THE QUESTION WHETHER THE WRIT SHOULD BE GRANTED

Petitioner argues that there was a defective search warrant. Examination of the warrant and of the affidavit supporting it reveals no defect. The trial court did not rule that the warrant was defective, but the question is entirely irrelevant to the question of the admissibility of evidence, since the warrant had nothing to do with that evidence. The trial court stated:

> "Prior to the trial and again at the commencement of the trial, the defendant moved to suppress all of the information and evidence and admissions by the defendant which were obtained subsequent to the time that the screen door was opened in order that the detectives could exhibit their identification to the young woman who answered the door. As a

basis for the motion to suppress, defendant asserted the invalidity of the search warrant, claiming that it was issued upon improper affidavit. The pretrial motion to suppress was denied without explanation.

The motion to suppress at the commencement of the trial was denied, and the trial court, although clearly of the opinion that the warrant was invalid, declined to rule on the warrant's validity, it being of the opinion that the information and evidence sought to be suppressed was obtained without the use of the search warrant. [1]

"1 'The Court: Well, I don't know whether [the magistrate did examine him under oath] or not, but there was no evidence before me on that. The only thing that is before me is the affidavit, the warrant, the motion to suppress. It is my conclusion for what it is worth that the warrant under the Aguilar case was defective. Now because the warrant was issued pursuant to an affidavit that was nothing more than conclusions, I agree

with counsel.

* * *

'Mr. Patchell [for the State]: Your honor, if that is your conclusion at that point may I put on further evidence?

'The Court: No, because I still don't see that the search or seizure or the statement of the defendant was obtained as a result of this unlawful, illegal warrant. I don't think that the search or the questioning was unreasonable under the circumstances and I'm going to deny the motion.'"

Petitioner attempts to distinguish Davis v. United States, 327 F.2d 301, 305 (9th Cir. 1964) on the basis that in the instant case there was a search and an unlawful entry. There was no search of the apartment within the accepted meaning of the word, since the aquarium was in plain view as the officer stood at the door.

In State v. Carpenter, 181 Neb. 639, 647, 150 N.W.2d 129 (1967), the Court said:

> "A search implies some exploratory investigation. It is not a search to observe that which is open and patent, in either sunlight or artificial light."

In People v. Vasquez, 63 Cal.Rptr. 885, 888 (1967) it was said: "The mere looking at that which is in plain sight is not a search." When such items are seen under these circumstances, it is not necessary to obtain a search warrant before seizing the goods.

In Davis v. United States, 327 F.2d 301 (9th Cir. 1964) narcotics agents went to a house to talk to the defendant. They were admitted to the house by a child. On entering, the agents noticed a waste basket containing marijuana in plain sight five feet from the door. The Court, in stressing

that this observation did not constitute a search, stated:

> "* * * 'It is well established that it is not a search to observe what is open and patent either in daylight or in artificial light.' United States v. Lee, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202; Boyd v. United States, 4 Cir., 286 F. 930; Smith v. United States, 4 Cir., 2 F.2d 715; Safarik v. United States, 8 Cir., 62 F.2d 892, 895 * * *.' Petteway v. United States, 261 F.2d 53, 54 (4 Cir. 1958). As was said by Judge Holtzoff in United States v. McDaniel, 154 F.Supp. 1,2 (D.C. 1957), affirmed 255 F.2d 896 (D.C. Cir. 1958) and cert. denied 358 U.S. 853, 79 S.Ct. 82, 3 L.Ed.2d 87 (1958); Williams v. United States, 363 U.S. 849, 80 S.Ct. 626, 4 L.Ed.2d 1732 (1960). 'if, without a search and without an unlawful entry into the premises, a contraband article * * * is seen in the premises, the police are not required to close their eyes and need not walk out and leave the article where they saw it.' * * *" (p. 305)

See United States v. Martin, 386 F.2d 213

(3rd Cir. 1967); Ruiz v. State, 32 Ariz. 121, 256 P. 362 (1927); People v. Georgev, 38 Ill.2d 165, 230 N.E.2d 851 (1967). Once contraband or illicit goods are seen, the officer need not close his eyes and walk away. Davis v. United States, supra. The officer, in fact, would be derelict in his duty if he failed to seize such items.

When no search is made, no search warrant is required. As was well stated in State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967):

> "Moreover, it has been recognized in this jurisdiction that 'Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is

fully disclosed and open to the eye and hand.' State v. Giles, 254 N.C. 499, 119 S.E.2d 394." (p. 748)

The officer was clearly obliged to seize the property and it was admissible in evidence against the petitioner.

Had a search been necessary, and had the warrant been used to justify it, there would be no greater problem. The affidavit is sufficient under the holdings of the Arizona courts in State v. Kelly, 99 Ariz. 136, 407 P.2d 95 (1965); and State v. McMann, 3 Ariz. App. 111, 412 P.2d 286 (1966). Nothing in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) or Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958) requires the suppression of evidence obtained on a warrant issued on an affidavit

similar to that herein. The affidavit on its face is sufficient because it states that the above described articles were seen in Neall Pine's apartment and states positively that the officer knows they were seen. It is not necessary for him to explain how he knows they were seen. He need not prove the identity of the items beyond a reasonable doubt, nor establish "a chain of evidence" to show how they reached the apartment. The fact that an informer, if informer there was, and petitioner's brief cites no reference to the record indicating the existence of any such person, was able to describe the items so as to permit the detective to identify them furnishes all the voucher necessary to establish him as a reliable

informer. See State v. Musgrove, 2 Ariz.App. 505, 410 P.2d 127, reh. den. 3 Ariz.App. 155, 412 P.2d 724, cert. den. 385 U.S. 979 (1966). See also, Bailey v. United States, 386 F.2d 1 (5th Cir. 1967) and Lane v. United States, 321 F.2d 573 (5th Cir. 1963), where the officer's knowledge of some matters mentioned in the tip is held to be sufficient corroboration to establish reliability of an informer. The cases requiring that reliability of an informer be established to the satisfaction of the magistrate before a warrant is issued are invariably cases involving a search for contraband of a fungible nature and are cases where the informer provides the officer's knowledge of the existence of a crime, as well as the name of the perpetrator.

They are cases where there is a danger that the informer might be inventing a charge out of whole cloth; or where it is necessary to place reliance on his judgment that the material is actually contraband, not innocent matter resembling contraband. When an informer is able to describe loot so as to permit its identification, the fact that he can do so testifies to his reliability. Nothing further is required to establish probable cause.

The trial court did not rule that the search warrant was defective, as petitioner claims. The court never ruled on the question. Judge Fry did indicate at Vol. 1, page 21 of the transcript that he might have so ruled had its legality been in question.

Petitioner repeatedly refers to an informer or an informant, but the record does not reveal that there is any such person in existence. The affidavit of J. Stewart certainly does not refer to any such person.

When Officer Stewart arrested petitioner, he had seen in petitioner's house loot from two burglaries. He had not only probable cause to arrest him, but evidence sufficient to support a finding beyond a reasonable doubt of petitioner's guilt.

Petitioner claims that he was arrested without probable cause. Officer Stewart made the arrest after he had enough evidence to sustain the conviction. There is no question of the existence of probable cause. He did not search the premises, and his seizure of the evidence has nothing

to do with the validity of the search warrant. The validity of the search warrant is not in issue.

The arrest was effected after the officer had seen the loot from the burglary in the petitioner's apartment. He saw the loot while standing at the door establishing his identity as a police officer. The seizure needs no support of a warrant nor of an arrest. It is a police officer's duty to take into his custody the property of a victim when he finds it in the possession of a thief. See Davis V. United States, supra, and Rogers v. United States, 330 F.2d 535 (5th Cir. 1964).

Petitioner claims that his confession was inadmissible because he was intimidated by an illegal search warrant.

As the Arizona Court of Appeals held, if his confession was the product of intimidation by a warrant, legal or illegal, it was inadmissible; and the question of the legality or illegality of the warrant has nothing to do with the matter. There was no evidence that the confession was the product of the exhibition of the warrant, legal or illegal.

The question of the propriety of petitioner's request for a jury instruction to the effect that the search warrant was void and illegal is no more before this Court than the other questions petitioner attempts to raise. The petitioner has nowhere set out language of the instruction he claims that the trial court erred in failing to give at his request.

The question was not properly raised before the Arizona Court of Appeals, and it cannot be raised before this Court. Were the question properly before this Court, the wording of the instruction would be irrelevant, since in no conceivable form would it be proper to instruct as petitioner requested.

In the first place, as demonstrated above, the warrant was not improperly issued; but even if it were, the jury's determination of the voluntariness of the confession given by the petitioner has nothing to do with whether or not the warrant was proper or improper. If the confession were involuntary, if it were compelled, it it were anything other than the free and voluntary act of the peti-

tioner, then it was inadmissible. If compelled by a legal search warrant, it is no less inadmissible than if compelled by an illegal one. It was not compelled by anything but the petitioner's desire to tell the truth.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari herein should be denied.

Respectfully submitted,

GARY K. NELSON
The Attorney General

CARL WAAG
Assistant Attorney General

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

CARL WAAG, being first duly sworn, upon oath, deposes and says:

That he is an Assistant Attorney General of the State of Arizona; that as such he served the attorney for the petitioner in the foregoing case by forwarding two (2) exact copies of response to petition for writ of certiorari in a sealed envelope, first class postage prepaid, and depositing same in the United States mail addressed to:

William H. Tinney
2343 East Broadway
Tucson, Arizona

this _____day of May, 1969.

_____

SUBSCRIBED AND SWORN to before me this _____day of May, 1969.

_____
Notary Public

My commission expires: